No. 9473

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY
(a corporation),
Appellant,

vs.

MAZILLA TIGHE, AH CHONG and LEONG CHEUNG,
Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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A. STATEMENT AS TO JURISDICTION.

This action for declaratory relief was commenced by the appellant in the District Court of the United States for the Northern District of California, Southern Division.

Section 274d of the Federal Judicial Code, provides, in part, as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate

pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith."

In paragraph IV of the complaint (R. p. 3) the following allegation is made:

"That this suit is brought under and pursuant to the Federal Declaratory Judgment Act. (Judicial Code, section 274d, 28 U. S. C. A. section 400.)"

In paragraph VIII of the complaint (R. p. 6) we find the following allegations:

"That an actual controversy exists as between plaintiff and defendants herein, as follows: Defendants Ah Chong and Leong Cheung contend that since the automobile referred to in said complaint in said action brought by said Mazilla Tighe is the same automobile described in said insurance policy plaintiff herein has the obligation under said policy to defend said Ah Chong and Leong Cheung in said action; further, defendants Ah Chong, Leong Cheung and Mazilla Tighe con-

tend that if it should be adjudged in said action that said Ah Chong and Leong Cheung have any liability to pay any sums to said Mazilla Tighe by reason of the alleged accident set forth in said complaint in said action, then plaintiff herein has the obligation under said policy to pay said sums to said Mazilla Tighe up to the aggregate amount of $5,000; on the other hand, plaintiff herein denies and controverts said contentions and each of them and on its part contends that although the automobile referred to in said complaint of said Mazilla Tighe is the same automobile described in said policy of insurance, plaintiff herein has no obligations or liability under said policy so far as said alleged accident is concerned because said alleged accident did not arise out of the use of said automobile or the loading or unloading thereof; further plaintiff herein contends that it was released of all obligations and liability under said policy so far as said accident is concerned by reason of the failure of defendant Ah Chong to notify plaintiff that any such accident occurred for more than sixty days after it is alleged in said complaint the same occurred."

Section 24(1) of the Federal Judicial Code provides, in part, as follows:

"The District Courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, * * * the sum or value of $3,000 and * * * (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects."

In paragraph I of the complaint (R. p. 2) we find the following allegations:

> "That plaintiff, Maryland Casualty Company, is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Maryland, duly authorized and licensed to do business in the State of California, and having its principal place of business within the State of California, in the City and County of San Francisco."

In paragraph II of the complaint (R. p. 3) we find the following allegations:

> "That defendant Mazilla Tighe is a citizen of the State of California, and resides in the County of Alameda in said state; that defendant Ah Chong is a citizen and subject *to* the Republic of China, and resides in the City and County of San Francisco, in the State of California; that defendant Leong Cheung is a citizen of the State of California, and resides in the City and County of San Francisco in said state."

In paragraph III of the complaint (R. p. 3) we find the following allegation:

> "That the amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000.)."

This Court has jurisdiction to entertain this appeal by virtue of the provisions of Section 128 of the Federal Judicial Code. Said Section 128 provides, in part, as follows:

"The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions.

First—In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title. * * *"

B. STATEMENT OF THE CASE.

This is a suit for declaratory relief and an injunction. Upon the filing of the complaint a preliminary injunction was issued and an appeal from the order to this Court was dismissed without passing on the merits. (*Maryland Casualty Co. v. Tighe* (1938, C.C.A. 9th) 99 F. (2d) 727.) On the trial judgment went for defendants and plaintiff appeals.

The sole question involved is whether an accident which is the subject of an action in the State Court, is within the coverage of an automobile policy issued by the plaintiff to the defendant Ah Chong. The policy was attached to the complaint and it insures against injuries arising out of the ownership, maintenance and use of an automobile (truck), and provided that the use included "the loading and unloading thereof".

The complaint in the State Court (R. pp. 29-36) thus alleged the facts surrounding the accident:

"III.

That on the 26th day of November, 1937, the defendant Leong Cheung was an employee, agent

and servant of his co-defendant Ad Chong, and was by him regularly employed to distribute and deliver vegetable produce, and in the performance of said employment said defendant Leong Cheung was required to, and he did, operate and drive a certain delivery truck for the purpose of making deliveries of produce to various retail trade in said City and County of San Francisco; that said deliveries were made by said Leong Cheung by carrying vegetable produce from the said truck to various patrons of his employer, Ad Chong.

IV.

That at all times herein mentioned Sutter Street was and now is a public street in the City and County of San Francisco, California; that said street runs in a general easterly and westerly direction; that on said street, and in the block numbered '300', a restaurant is located known as the 'Piccadilli Inn'; that plaintiff herein is informed and believes, and upon such information and belief alleges the fact to be, that at times herein mentioned the aforesaid Piccadilli Inn was a customer of said Ad Chong and customarily and at intervals receives produce vegetables from said Ad Chong, and by and through the delivery thereof by Leong Cheung.

V.

That on or about the 26th day of November, 1937, and in the morning thereof at approximately 8:34 A. M., defendant Leong Cheung was making a delivery of produce vegetables to the said Piccadilli Inn, and that at said time and place he had left his aforesaid delivery truck standing parked at the curb and opposite to, and

about ten feet from, the entrance of said Piccadilli Inn.

That at said time and place the plaintiff herein was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilli Inn; that at said time and place defendant Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: That *after making a delivery to the aforesaid Piccadilli Inn,* he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder as he continued running forward, in a negligent and careless manner; that he ran toward the aforementioned truck at the curb, and in so doing collided with the plaintiff herein as she walked along the aforesaid sidewalk, with such force and effect that plaintiff was knocked violently to the sidewalk and was caused to sustain injuries as more particularly hereinafter appears." (Italics ours.)

On the trial of the suit at bar this statement was by evidence somewhat amplified, and to a certain extent modified, and the facts thus shown which surrounded the accident are stated in the findings (R. pp. 61-71) in this case as follows:

"6. That on or about the 25th day of January 1938, defendant Mazilla Tighe commenced an action for damages against defendants Ah Chong and Leong Cheung in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled Mazilla Tighe,

Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, Black and White Company, a corporation, Defendants, and numbered therein No. 278962; that in the complaint of said Mazilla Tighe, in said action said Mazilla Tighe alleged that on the 26th day of November, 1937, said Leong Cheung was an employee of said Ah Chong and, while so employed, said Leong Cheung made a delivery of vegetable produce to a restaurant known as Piccadilly Inn and located in the 300 block of Sutter Street in San Francisco, from a delivery truck parked at the curb on said Sutter Street and opposite to, and about ten feet from, the entrance of said Piccadilly Inn; that at said time and place said Mazilla Tighe was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilly Inn; that at said time and place said Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: that after making a delivery to the aforesaid Piccadilly Inn, he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder, as he continued running forward, in a negligent and careless manner; that he ran toward the aforesaid truck at the curb, and in so doing collided with said Mazilla Tighe as she walked along the aforesaid sidewalk, with such force and effect that said Mazilla Tighe was knocked violently to the sidewalk and was caused to sustain injuries as more particularly in said complaint appears; * * *.'' (R. pp. 62-64.)

"7. That the facts as they are set out in the complaint heretofore referred to and designated as Exhibit 'B' and as developed on the trial of this case indicates that the alleged accident and resulting injury, if any, occurred as the defendants were using this truck in making delivery of produce to a customer and while defendant Leong Cheung was returning to the truck to obtain further vegetables for delivery, and is within the coverage of the aforesaid policy hereinbefore designated as Exhibit 'A'." (R. p. 64.)

"12. With regard to the accident involved in said action in the state court, the court finds that on the 26th day of November, 1937, the truck in question was parked against the curb on the opposite side of Sutter Street from Piccadilly Inn, and the said defendant Leong Cheung removed certain vegetables from said truck and carried them across Sutter Street and across the sidewalk thereof into said Piccadilly Inn, and there delivered and left the said vegetables. He then started to return to said truck for the purpose of obtaining further vegetables to deliver to the said Piccadilly Inn, and if the said plaintiff Leong Cheung collided at all with plaintiff Mazilla Tighe (which said plaintiff Leong Cheung denies) the collision happened as he emerged from said Piccadilly Inn for the purpose of obtaining further vegetables and before the unloading of vegetables for Piccadilly Inn from said truck had been completed." (R. p. 67.)

From these facts the trial Court concluded that the accident was within the coverage of the policy, and therefore dissolved the temporary injunction and gave judgment for defendants with costs. (R. pp. 68-69.)

As the findings set forth the probative facts fully and correctly, it is unnecessary to review the evidence in order to combat the legal conclusion that the accident is within the coverage of the policy.

C. SPECIFICATION OF ERRORS.

1. The Court erred in finding that the alleged accident and resulting injuries, if any, occurred as the defendants were using the truck in making delivery of produce to a customer, in this (1) that the evidence and findings show that the truck was not used to make such delivery, but delivery was made by an employee of the insured, and (2) that the delivery was complete and the employee at the time of the accident was returning to the truck which at the time was parked on the opposite side of the street.

2. The Court erred in finding that the accident caused by an employee after he had unloaded produce from the truck and carried it by hand across the street and sidewalk and delivered the same to a customer in a building on the opposite side of the street and was returning to the truck for further produce at the time of the accident, is within the coverage of the policy involved herein.

3. The Court erred in finding that because the employee was returning to the truck with the purpose of obtaining produce in order to make further deliveries, the accident resulted from the use of the truck, or from the loading or unloading thereof.

4. The Court erred in holding that the accident involved in the action in the State Court was within the coverage of the insurance policy involved herein.

5. The Court erred in not holding that the accident involved in the action in the State Court was not within the coverage of the insurance policy involved herein.

6. The Court erred in adjudging that plaintiff take nothing by this action, in that it should have adjudged that said accident was not within the coverage of the insurance policy involved herein.

7. The Court erred in not adjudging that plaintiff has no obligation under said policy to defend said action in the State Court.

8. The Court erred in not adjudging that plaintiff has no liability under said policy by reason of the accident involved in the action in the State Court because the said accident did not arise out of the use of the automobile described in and covered by said policy.

9. The Court erred in not enjoining the defendants from taking any proceedings for the purpose of imposing any liability upon plaintiff based upon any judgment that may be rendered for Mazilla Tighe in said action in the State Court.

10. The Court erred in dissolving the preliminary injunction.

11. The Court erred in awarding costs to defendants and in not awarding costs to plaintiff.

D. ARGUMENT.

The trial judge in deciding the case filed a written opinion. (R. p. 56.) He held that if the man who made the delivery and was returning at the time of the accident had completed the delivery of all produce from the truck destined to that particular customer, the accident would not be covered, but since the man making the delivery intended to return to the truck for further produce for the same customer, the unloading was not complete. From this he concluded that the accident arose out of the use of the truck. He neither cited nor relied upon any authority construing such a policy. The only cases cited by him were cases to the effect that if the policy was ambiguous it should be construed against the insurance company.

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(1) THE POLICY WAS NOT AMBIGUOUS AND SUCH POLICIES HAVE BEEN MANY TIMES CONSTRUED NOT TO COVER ACCIDENTS WHICH OCCUR (1) IN THE PROCESS OF DELIVERY, WHERE THE DELIVERY IS DISCONNECTED WITH THE USE OF THE TRUCK, OR (2) IN CONNECTION WITH THE ARTICLE UNLOADED BUT AFTER THE UNLOADING OF THE ARTICLE IS COMPLETE. NO CASE MAKES THE DISTINCTION DRAWN BY THE TRIAL JUDGE IN THIS CASE.

The cases which have arisen under such policies are of two classes: (1) where an article is unloaded, and the driver of the truck then makes delivery by hand or other means, leaving the truck, passing from the street into a building, and the accident occurs during such delivery; (2) where merchandise is unloaded, but

is left in a dangerous place and causes an injury. In both classes of cases it is held that the accident does not arise out of the use and operation of the truck or out of the unloading thereof. These decisions are so numerous and so uniform that they should be held to enter into the policy. At all events we submit that they correctly construe the policy and correctly hold that the policy is in no way ambiguous. We therefore submit the matter on a review of those cases, which we now make:

> *Jackson Floor Covering Company v. Maryland Casualty Company,* 189 Atl. 84, 117 N. J. Law 401 (1937).

In this case the Maryland carried the liability policy and another company carried the automobile policy.

The Floor Company had sold several rolls of linoleum to a customer and delivered the same in its truck by backing the truck up to the loading platform and there unloading the linoleum upon a small hand truck for complete delivery of the linoleum to the designated place in the building.

While the hand truck was being propelled a roll of linoleum fell off and injured a third party. Maryland Casualty Company contended that this injury resulted from the loading and unloading of the motor vehicle and was, therefore, covered under the automobile policy and not under the liability policy. The Court said:

> "It appears that the unloading of the plaintiff's automobile truck had been completed and that the

transportation from then on was by a different means; hence, there could have been no concurrent coverage since the carrier insuring the automobile truck was under no obligation."

Franklin Co-Op. Creamery Ass'n. v. Employers' Liability Assurance Corporation, et al. (Minn. 1937), 273 N. W. 809.

In this case the policy provided for coverage of personal injuries, "(1) caused by, and/or owing to the ownership, the maintenance, the use, and/or operation of, all horses, draft animals, and/or vehicles, used in connection with the business operations of the assured described in the declarations, and (2) caused by or resulting from the loading and/or *unloading of the said vehicles*".

The employee of the assured stopped his milk wagon in front of a building, filled his containers with milk bottles, and entered the building. After entering the building he walked about 30 feet to a freight elevator, set down his container, and then, for the purpose of using the elevator pulled on the ropes or cables which controlled its operation. In so doing, he injured a third person. Liability of the assured to the third person was established, and a declaratory judgment is sought to determine whether the insurer had a duty to indemnify the assured.

The Court held that the accident was not within the policy, saying at page 810:

"1. Was the process of unloading complete? We are of the opinion that the trial court rightly held that it was. The process of distributing

bottled milk at retail is familiar to us all and we take judicial notice of it. Rundquist had started on his rounds to peddle milk to his various customers. After he left his wagon carrying his containers, the process of retail distribution commenced. If he had served customers on the first floor prior to his attempt to take the elevator, it could hardly be contended that he was still engaged in unloading the vehicle. Nor could it be so contended if some accident had happened while he was passing from customer to customer. We see no difference in principle or in the application of the policy between such situations and the one at bar. Many cases are cited by appellant but are distinguishable on the facts. Necessarily the unloading of a great variety of merchandise involves various situations resulting in various holdings as to when the process of unloading terminates. Within limits each case must stand on its own facts. This one stands outside the terms of the unloading clause of the policy."

Zurich General Accident & Liability Ins. Co., Limited v. American Mut. Liability Ins. Co. of Boston, 192 Atl. 387, 118 N. J. Law 317 (1937).

The point in controversy was which of two policies of liability insurance, issued by plaintiff and defendant, respectively, affords indemnity coverage.

It was stipulated that a chauffeur of the assured

" 'had driven an automobile belonging to said concern to the store of Borer, who was a customer of said corporation and had removed from said automobile truck a can of milk and a cake

> of ice, which milk and ice the chauffeur had carried from said automobile to the store of the said Borer and while placing the milk and ice in an icebox maintained in the interior of the premises of said Borer, injured the said Borer' ".

The company whose policy covered accidents caused by the assured's drivers and chauffeurs, "except those arising in connection with the maintenance, use or operation of teams or motor vehicles", claimed that the injury was covered by the defendant's policy. The defendant had obligated itself

> " 'to pay * * * each loss by reason of liability imposed' upon the assured 'by law for damages, * * * caused by an accident * * * by reason of the use, ownership, maintenance, or operation of the motor vehicle or trailer, or, if the motor vehicle is of the commercial type, by reason of the loading or unloading of merchandise, provided the insured has, as respects such loading or unloading operations, no other collectible insurance' ".

The Court found that the plaintiff rather than the defendant should pay the loss (that is, that unloading had been completed), saying at page 389:

> "We have no occasion to determine whether an accident occurring in the course of the 'loading or unloading' of a vehicle within the policy coverage arises in connection with its 'maintenance, use or operation', within the intendment of plaintiff's policy. Here the unloading of the merchandise had been completed when the accident occurred."

John Alt Furniture Co. v. Maryland Casualty Co., 88 F. (2d) 36 (Circuit Court of Appeals, Eighth Circuit) (1937).

In this case it appeared that the assured's employees in the course of their duties were engaged in delivering furniture to a customer. The furniture was transported to the customer's premises in one of the assured's trucks driven by its employees. In order to carry the furniture from the truck to the customer's apartment, it was necessary to remove a door from the rear of the building. This door was removed and leaned against a clothes pole on the property. The door fell, causing an injury to another occupant of the premises. The insurance company which had written the automobile policy asserted that the accident in question was not covered by its policy, but it did defend the suit under a non-waiver agreement. Judgment went against the assured, who paid the judgment and brought an action for reimbursement against the company which had written the public liability policy. The Court said that the accident in question was not covered by the automobile policy and held that the accident was covered by the public liability policy, although it appeared that the assured's employees were actively engaged in delivering the furniture when the accident occurred. The policy under consideration in this case did not include a loading and unloading clause, but, as we shall see, it has been held that it was not necessary to expressly include "loading and unloading" in order to bring such activity within the coverage of a policy insuring

against loss resulting from the "use, operation or maintenance" of the automobile. The Court in this case clearly felt, as we do, that an accident occurring in connection with the delivery of goods transported by automobile would not fall within the coverage of an automobile policy, even though delivery had not been completed at the time the accident occurred.

The case of *Armour & Company v. General Accident, Fire & Life Assurance Corporation, Ltd.* (Number 20,287-L) decided by Judge Louderback on November 2, 1939, is a recent case in this District on the question of the scope of policies of the type here involved. In this case an employee of Armour & Company unloaded hams from an automobile and by use of a small hand-truck transported them into a market. It was customary for the proprietor of the market to weigh the hams before accepting delivery. On this occasion, however, the proprietor was absent at the moment, and the delivery man left the hams, intending to return later to check the weight and pick up the invoice he had left. The delivery man was negligent in leaving the hand-truck containing the hams in a dangerous place, and by reason of that negligence a customer of the market was injured. In an action based on that negligence the customer recovered judgment against Armour & Company. Armour & Company brought an action against the insurance company which had issued the automobile policy. Judge Louderback granted a motion for a nonsuit, holding in effect that negligence in connection with delivery was not covered by the policy.

Luchte v. State Automobile Mutual Ins. Co.,
197 N. E. 421, 50 Ohio App. 5 (1935).

Plaintiff (the insured) sued to recover expenses in defending a suit which he claimed the defendant insurance company was obligated by its policy to defend. The policy contained the following provisions:

> " 'The Association does hereby insure the assured against liability for loss and all expenses resulting from claims upon the assured for damage caused while this policy is in force, by the use, ownership, maintenance, or operation of the motor vehicle described in Statement 4 of Schedule of Warranties * * *.' "

The facts are stated by the Court, as follows:

> "While the policy was in force, an employee of Luchte delivered a load of coal to a customer, and in making the delivery used the automobile truck insured under the policy. Plaintiff's employee dumped the coal in the street in front of the customer's house, drove away a short distance, turned, and was returning to his place of business from the delivery. He dumped the coal in the early morning before clear daylight, and failed to leave any light or other warning on the pile of coal. A man by the name of Bell, driving a motorcycle, ran into the pile of coal and received injuries from which he died."

The Court decided that under the circumstances the accident did not result from a risk undertaken by the insurance company and that the company was under no duty to defend the action.

The Court apparently took the view that there was no negligence in unloading but that the negligence

was in leaving the pile of coal unprotected. The following is Syllabus 1 prepared by the Court:

> "An automobile liability insurance policy insuring against liability for loss resulting from claims for damages caused by the use, ownership, maintenance, or operation of a coal truck, does not cover a claim for wrongful death resulting from a collision, in the early morning before daylight, with a pile of coal dumped into the street from such truck and negligently left unprotected and without lights or warning, contrary to a city ordinance."

Morgan v. N. Y. Cas. Co. (Ga. 1936), 188 S. E. 581.

The plaintiff sought to recover from the insurance company for its failure to defend him in an action brought against him for personal injuries. The policy provided that the insurance company would pay all claims which the insured might become liable to pay as damages, either direct or consequential, resulting by reason of the ownership, maintenance, or use of a truck for the transportation of materials, *including loading and unloading,* and "to defend suits for damages, even if groundless, in the name and on behalf of the assured".

The Court pointed out that the complaint upon which the suit for personal injury was based did not connect the injury with the use of the trucks. (The complaint stated that the defendant was delivering coal through a chute, and that while chute was unattended plaintiff fell into it.)

The Court concluded that:

> "So it clearly appears from the allegations of the Freeman petition that the proximate cause of his injuries was not from the use or operation of the truck in transporting materials or merchandise or loading or unloading, but that the proximate cause of his injuries was his falling into the open and unattended coal chute, as therein alleged. The insurance company would not be bound to defend a suit, although groundless, unless in some way the injuries resulted from the maintenance or use of the automobile truck."

Stammer v. Kitzmiller, et al. (Wis. 1937), 276 N. W. 629.

The facts as stated by the Court were as follows:

> "On January 16, 1935, an employee of the Blatz Brewing Company was using one of its trucks to deliver beer to a tavern. He parked the truck alongside the curb, got out, and opened a hatchway in the sidewalk; then he removed a barrel of beer from the truck and placed it either on the sidewalk or on the street pavement. He then lifted the barrel and put it through the hatchway into the basement of the tavern. While he was engaged in having the sales slip for the beer signed inside the tavern, the plaintiff fell into the open hatchway, left unguarded by the Blatz employee."

The Court held that the facts stated did not present a case within the terms of the policy. On page 631 the Court said:

> "We pass to the question of the coverage afforded by the stipulation in the Employers Mu-

tual Insurance policy, which reads: 'Operation, maintenance or use (including transportation of goods, loading and unloading) of an automobile'. The stipulation to pay all losses and expenses imposed by law under the clause quoted does not carry the liability of the insurer beyond what may be described as the natural territorial limits of an automobile and the process of loading and unloading it. When the goods have been taken off the automobile and have actually come to rest, when the automobile itself is no longer connected with the process of unloading, and when the material which has been unloaded from the automobile has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile then may be said to be no longer in use. The precise line at which the unloading of the automobile ends and a further phase of commerce such as the completion of delivery begins after unloading may in some cases be difficult of ascertainment, but where, as here, the merchandise had been removed from the truck and considerable time had elapsed after anything was done which could reasonably be said to be connected with the actual unloading, there is no difficulty in limiting the responsibility of the insurer who covers loading and unloading operations, and fixing the liability of an insurer who protects against loss arising from the acts caused by employees of the assured engaged in the discharge of their duties to carry on its work off the assured's premises."

The case of *In re Consolidated Indemnity Insurance Co.,* 161 Misc. 701 (New York) (1936); 292

N. Y. S. 743, is of interest although it did not involve delivery. In that case the automobile policy covered liability for damages resulting from the "operation, maintenance, use or the defective construction" of a taxicab belonging to the assured. It was claimed that the assured was liable for damage to a hall resulting from the negligent handling of a trunk which the employee was carrying from the apartment to the taxicab. The Court said that the liability of the assured for the negligent transportation of the trunk was clearly not within the coverage of the policy for the damage to the apartment house was wholly unconnected with the "operation, maintenance, use or construction" of the taxicab. If the Court in this case followed the reasoning of the Court below in deciding the principal case, the assured would have been held liable for the negligent handling of the trunk. The argument would have been "operation, maintenance and use" includes the "loading or unloading" of a vehicle; the carrying of goods toward the vehicle is a part of the process of loading and, accordingly, the accident in question arose out of the "operation, maintenance or use" of the truck.

The coverage contemplated by the committee which drafted the policy is stated by Mr. E. W. Sawyer in his book entitled "Automobile Liability Insurance". His statement, which is quoted below, is in accord with the view of the Courts as to the scope of the policy. Mr. Sawyer says:

> "The placing of goods, merchandise, or other materials in commercial automobiles is recognized as a part of the hazard in the use of the auto-

mobile, and the same is true of removal. As a general rule, it may be said that the hazard contemplated as included in loading and unloading of the automobile does not extend beyond the immediate vicinity of the automobile. The conveyance of furniture from the second floor of a house to the sidewalk does not constitute a part of the loading hazard. The placing of the furniture on the automobile does constitute a part of the hazard contemplated. The actual removal of the goods from the automobile is the unloading hazard which is contemplated. The carrying of goods away from the automobile is not a part of the unloading hazard.

"A reasonable practical interpretation adopted by some companies is that the loading hazard includes carrying the goods from the nearest available place of temporary deposit, such as a platform or sidewalk; and that the unloading hazard includes carrying the goods from the automobile to such place of deposit. This interpretation means simply this: If the automobile is being unloaded in a street, it is not expected that the goods will be deposited in the street. Therefore unloading would be interpreted as including placing the goods on the sidewalk. If the goods are not placed on the sidewalk but are carried beyond it, the unloading hazard would end when the goods had been removed from the automobile.

"A further example will serve to illustrate both the scope and the limitations of the insurance of the loading and unloading hazard. A trucking concern is engaged to transport merchandise. It uses both horse drawn vehicles and automobiles. The merchandise must be transferred from rail-

road freight cars over a platform for a distance of fifty yards. Hand trucks are used for this purpose, and the merchandise is not removed from the hand trucks until they are run onto the automobile or horse-drawn vehicle. The loading hazard which is included in the coverage of the automobile liability policy is that which begins when the hand trucks are run onto the automobiles. And, conversely, the unloading hazard would end when hand trucks, run onto the automobile to be loaded, were run off the automobile. The transferring of the merchandise from the freight cars across the platform by hand trucks or the transfer of the merchandise from the automobiles or horse-drawn vehicles across the platform to the freight cars is not a hazard of loading and unloading of the automobiles or horse-drawn vehicles. Such operations should be insured under appropriate public liability policies."

The appellees have attempted to distinguish the principal case from some of those cited above by saying that when the Courts ruled that unloading had been completed or that the accident did not arise out of the unloading, they meant that because no further merchandise was to be removed from the truck at that particular point, the unloading was complete although delivery was not complete. We believe, however, that the correct conclusion to be drawn from those cases is that the Courts believed that the hazard of actual unloading was within the coverage of automobile policies and that hazards of delivery by means independent of the truck were not covered by such policies. The Courts in the type of cases mentioned

said in effect: the unloading is complete, or the accident did not arise out of the act of unloading, because at the time of the accident the assured was not engaged in unloading the vehicle; he was delivering the merchandise which had been unloaded. That is as true in our case as in the cases in which the distinction is asserted.

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(2) THE FACTS IN THE CASE AT BAR CANNOT BE SUCCESSFULLY DISTINGUISHED FROM THE CASES CITED.

In this case the truck was static at the curb on the opposite side of the street from the place of the accident. It was not being "operated" and its only "use" was in holding certain produce in a static position. Certain produce had been "unloaded" and entirely separated from the truck and carried by hand across the street, across the opposite sidewalk, and into the Inn, and was there delivered and came to rest. In returning empty-handed the delivery boy was neither loading or unloading the truck. His *intention* to go back across the sidewalk and across the street and to the truck and there unload further produce, no more constituted "unloading" than a like intention formed when he left his home in the morning *intending* to ride on the truck and unload produce and make delivery thereof.

The unloading of the produce actually unloaded was completed. No injury occurred from that process, nor did any injury occur from the unloading of further produce, because it was not unloaded but at the time of the accident was still in place on the truck. What

difference does it make whether the boy intended to make further deliveries to the same customer or to some other customer? In neither event was his mere *intention* to unload an act of unloading. The mere fact that the truck was not completely unloaded at the time of the accident does not show that the accident was caused by the "unloading". Suppose the boy had first gone into the Inn to find what produce was desired and was coming back to get the desired produce. That might have been the practice or the system, still his trip into and out of the Inn would not constitute or be a part of the unloading. So far as the produce which was actually delivered is concerned, its unloading caused no injury. It was safely unloaded and delivered without incident. So far as other produce was concerned, its unloading caused no injury, because at the time of the accident it was still resting undisturbed in the truck.

Even if this accident had happened while the produce was being *delivered* it would not be covered unless at the time of the accident the produce was being unloaded. *Delivery* might involve the use of other means of transportation, such as roller skates, tramways, elevators, escalators, hand trucks, stairways, etc. Long distances might be involved. How can such things be held to be "unloading", which is defined as being part of the use and operation of the truck? But here the accident did not occur even during *delivery,* but occurred after the only thing unloaded had been delivered.

Before the rule that a policy must be interpreted against the insurer can be invoked, it must be shown

that the policy is ambiguous. Wherein is the policy ambiguous? The words "use", "operation", "loading" and "unloading" are words of clear meaning. No testimony was introduced as to the meaning of such words. Where, therefore, is the ambiguity? Of course, questions of fact may arise as to whether certain things constitute use, operation, unloading or loading, but that is not because the words are ambiguous. The mere lack of definition of words of ordinary and single meaning does not constitute an ambiguity for which the author of the document is to be penalized by adopting the most unfavorable meaning. That rule can only apply when words are used which have different or double meanings. The words "use", "operation", "loading" and "unloading" are common words which everyone understands. That "use" of an automobile includes the loading and unloading was held even when the policy did not specifically so provide.

Panhandle Steel Products Co. v. Fidelity Union Casualty Co., 23 S. W. (2d) 799 (Texas).

One is using an automobile if he is loading it or unloading it, because both acts are *physically* connected with the automobile. But a person delivering material after it has been unloaded is not using the automobile. One returning to the truck after making a delivery is not using the truck. A use must be physical, not merely mental. A person crating or boxing produce intended to be loaded into a truck is not using the truck. A person transporting produce to a truck with the intention of loading it on the truck is not using the truck. The mere fact that the same person manu-

factures, crates, transports, loads, unloads, and delivers produce does not make manufacture, crating, transporting, or delivery part of the process of loading and unloading, nor does it make such acts a use of the truck. The process, no matter how often repeated, of unloading, delivering and returning from delivery does not make delivery and returning from delivery part of the process of unloading.

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(3) EVEN IF DELIVERY WERE PART OF UNLOADING, RETURNING FROM SUCH DELIVERY CANNOT BE SO CONSIDERED.

If the argument should be made that the unloading was not complete until the article unloaded came to rest, and that, therefore, the unloading of the article was not complete until delivered into the Inn, still the unloading and delivery of that article was complete at all events when it was so delivered. In returning the person making the delivery was certainly not unloading.

E. CONCLUSION.

We submit that the judgment of the District Court should be reversed.

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